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craigslist, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CRAIGSLIST, INC., a Delaware
corporation

Plaintiff,

v.

3TAPS, INC., a Delaware corporation;
PADMAPPER, INC., a Delaware
corporation; DISCOVER HOME
NETWORK, INC., a Delaware corporation
d/b/a LOVELY; HARD YAKA, INC., a
Delaware corporation; BRIAN R. NIESSEN,
an individual; ROBERT G. KIDD, an
individual; and Does 1 through 25, inclusive,

Defendants.

CASE NO. 3:12-CV-03816-CRB

**PLAINTIFF CRAIGSLIST, INC.'S MOTION
FOR LIMITED RELIEF FROM CERTAIN
REQUIREMENTS OF THE STIPULATED
PROTECTIVE ORDER**

Assigned to Hon. Charles Breyer

Hearing Date: February 12, 2016
Time: 10:00 a.m.
Courtroom: 6

NOTICE OF MOTION AND MOTION FOR LIMITED RELIEF FROM
STIPULATED PROTECTIVE ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 12, 2016, at 10:00 a.m., or as soon thereafter as the matter may be heard in the courtroom of the Honorable Charles R. Breyer, located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff craigslist, Inc. (“craigslist”) will, and hereby does, move pursuant to Federal Rule of Civil Procedure 26(c) for limited relief from certain requirements of the Stipulated Protective Order (“SPO”) (Dkt. No. 105) regarding the destruction of Protected Material after final disposition of this case.

The deadline to return or destroy Protected Materials (as that term is defined in the SPO) is January 7, 2016. Craigslist, however, currently has a dispute with its former counsel, Perkins Coie, regarding Perkins’ representation of craigslist in this case, which has created a retention obligation that may apply to the Protected Materials. craigslist thus respectfully requests that the Court extend the deadline by which craigslist must destroy Protected Materials under the SPO to 45 days after the termination of this retention obligation. All of the remaining terms of the SPO will remain in full force and effect, and craigslist will continue to treat all Protected Materials as required under the SPO.

craigslist met and conferred with defendants 3taps, Inc., Greg Kidd, Hard Yaka, Inc., and Discover Home Network, Inc. (d/b/a Lovely) (the “3taps Defendants”), and PadMapper, Inc. on December 28, 2015 to determine whether craigslist could file this as a consent/unopposed motion. The 3taps Defendants refused to consent to this motion; PadMapper did not respond.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Jennifer L. Barry, and the records and files in this action, and upon any other matter the Court may consider.

Relief Sought

Pursuant to Rule 26(c), craigslist seeks an order modifying the SPO to delay craigslist’s obligation to destroy Protected Materials until 45 days after craigslist’s legal retention obligations cease for such materials.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Stipulated Protective Order (“SPO”) governing this case requires, *inter alia*, that the parties return or destroy all “Protected Material” within sixty days “after the final dispositions of this case.” The deadline to do so is January 7, 2016. Plaintiff craigslist, Inc. (“craigslist”) currently has a dispute with its former counsel, Perkins Coie, regarding Perkins’ representation of craigslist on this case, which has created a retention obligation that may apply to the Protected Materials.¹ As craigslist must retain these materials pursuant to its discovery obligations under the Federal Rules of Civil Procedure, the California Code of Civil Procedure, applicable local rules, and applicable case law, craigslist respectfully seeks limited relief from the document destruction requirements of the SPO to permit it to comply with this retention obligation.

II. PROCEDURAL HISTORY AND FACTS

On July 20, 2012, craigslist filed this lawsuit against defendants 3taps, Inc. and PadMapper, Inc., and it subsequently added defendants Discover Home Network, Inc. (d/b/a Lovely), Robert Kidd, Hard Yaka, Inc., and Brian Niessen. On September 6, 2013, the Court entered the SPO (Dkt. No. 105) to govern discovery matters in this action.

Final judgments and permanent injunctions were issued against (1) Discover Home Network, Inc. (d/b/a Lovely) (via stipulation) on April 3, 2015; (2) 3taps, Inc., PadMapper, Inc., Robert Kidd, and Hard Yaka, Inc. (via stipulation) on June 30, 2015; and (3) Brian Niessen (via default) on October 9, 2015. *See* Dkt. Nos. 224, 271, 272, and 280. Mr. Niessen has not filed any appeal of the October 9 judgment against him. *Id.* ¶ 3.

The SPO provides that “all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter” are Protected Material if they qualify under Section 2 of the SPO and a

¹ craigslist does not seek permission to divulge any Protected Material at this time, and it will comply with the SPO’s notice requirements to ensure defendants’ interests are protected if disclosure of such materials ever becomes necessary.

1 party has designated them as such. *See* Declaration of Jennifer L. Barry Support of Plaintiff's
 2 Motion Regarding Relief From Requirements Of Stipulated Protective Order After Final
 3 Disposition ("Barry Dec.") ¶ 2, Ex. A ¶ 2 (defining Protected Materials).

4 The SPO requires that "[w]ithin 60 days after the final disposition of this action, as
 5 defined in paragraph 4, each Receiving Party must return all Protected Material to the Producing
 6 Party or destroy such material." *Id.*, Ex. A ¶ 14. Under paragraph 4, "final disposition shall be
 7 deemed to be the later of (1) dismissal of all claims and defenses in this action, with or without
 8 prejudice; and (2) final judgment herein after the completion and exhaustion of all appeals,
 9 rehearings, remands, trials, or reviews of this action, including the time limits for filing any
 10 motions or applications for extension of time pursuant to applicable law." *Id.*, Ex. A ¶ 4.
 11 Further, "[n]othing in this Order abridges the right of any person to seek its modification by the
 12 court in the future." *Id.*, Ex. A ¶ 13.

13 craigslist is currently engaged in a dispute with its former counsel Perkins Coie related to
 14 Perkins' representation of craigslist in this case. *Id.* ¶ 4. This dispute has created a retention
 15 obligation that may apply to the Protected Materials. *Id.* craigslist therefore seeks limited relief
 16 from the destruction obligations under the SPO by the current deadline of January 7, 2016 so that
 17 it can comply with this retention obligation. *Id.*

18 **III. LEGAL STANDARDS**

19 Under Rule 26(c), a court may modify a stipulated protective order for "good cause,"
 20 including to allow use of discovery material from that action in another litigation. *See, e.g.,*
 21 *Oracle USA, Inc. v. Rimini St., Inc.*, No. 10-00106, 2012 U.S. Dist. Lexis 174441, *32-35 (D.
 22 Nev. Dec. 6, 2012) (citing *Foltz v. State Farm Mut. Auto Insurance Co.*, 331 F.3d 1122 (9th Cir.
 23 2003)). The court need only make a "rough estimate" that the discovery material could be
 24 relevant in the other litigation, and that modifying the protective order could "eliminate the
 25 potential for duplicative discovery." *Oracle*, 2012 U.S. Dist. Lexis 174441, *32-35. The court
 26 "does not decide whether the [other] litigants will ultimately obtain the discovery materials," and
 27 thus "must refrain from embroiling itself in the specific discovery disputes applicable only to the
 28 collateral suit." *Id.* Whether the materials are later discoverable in the other litigation, is left to

1 the other court. *Id.*

2 “Litigants have a duty to preserve what they know, or should know, is relevant in the
3 action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably
4 likely to be requested during discovery and/or is the subject of a pending discovery request.”
5 *Toppan Photomasks, Inc. v. Park*, No. 13-03323, 2014 U.S. Dist. Lexis 74063, *14 (N.D. Cal.
6 May 29, 2014). The duty “arises not only during litigation but also extends to that period before
7 the litigation when a party reasonably should know that the evidence may be relevant to
8 anticipated litigation.” *Id.* A party’s destruction or failure to preserve evidence once this duty
9 attaches may lead to wide ranging sanctions, including terminating sanctions. *See, e.g.,*
10 *Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc.*, 101 F. Supp. 3d 856, 872 (C.D. Cal. 2015).

11 **IV. ARGUMENT**

12 The Court should modify the SPO to extend the destruction requirements applicable to
13 Protected Materials for craigslist because such material may be relevant to craigslist’s dispute
14 with Perkins which could result in litigation, and craigslist could face serious sanctions for
15 destroying such materials. Under the current terms of the SPO, craigslist must return or destroy
16 all Protected Material from this action by January 7, 2016, which is sixty days after the judgment
17 against Niessen became final and this action was finally terminated. *See* Barry Dec. ¶ 3; *id.*, Ex.
18 A ¶¶ 4, 14; *see also* Federal Rule of Appellate Procedure 4(a)(1)(A) (a party has thirty days to
19 file an appeal after entry of judgment).

20 Protected Materials from this litigation could be relevant/responsive in craigslist’s dispute
21 with Perkins, and the preservation of these materials would allow the parties to potentially avoid
22 duplicative discovery. craigslist must therefore preserve Protected Materials that could be
23 relevant in this later action, otherwise it can face sanctions for violating its preservation
24 obligations. *See, e.g., Consumer Fin.*, 101 F. Supp. 3d at 875-76 (entering default judgment
25 against a party for failing to preserve evidence); *Toppan Photomasks*, 2014 U.S. Dist. Lexis
26 74063, at *39-40 (entering monetary sanctions against party for failing to preserve evidence).
27 All of the remaining terms of the SPO will remain in full force and effect, and craigslist will
28 continue to treat all Protected Materials as required under the SPO. Barry Dec. ¶ 5.

Therefore, good cause exists to modify the SPO to allow craigslist to retain Protected Materials until 45 days after its current preservation obligation ceases. *See, e.g., Oracle*, 2012 U.S. Dist. Lexis 174441, *38, 41 (modifying protective order to allow for discovery material to be used in another litigation subject to the protective order in that case).

V. REQUIRED MEET AND CONFER

craigslist met and conferred with defendants 3taps, Inc., Greg Kidd, Hard Yaka, Inc., and Discover Home Network, Inc. (d/b/a Lovely) (the “3taps Defendants”), and PadMapper, Inc. on December 28, 2015 to determine whether craigslist could file this as a consent/unopposed motion. The 3taps Defendants refused to consent to this motion; PadMapper did not respond. *Id.* ¶ 6.

VI. CONCLUSION

craigslist respectfully requests that the Court modify the SPO to move the deadline to return or destroy Protected Materials until 45 days after the termination of craigslist’s ongoing preservation obligations.

Dated: January 7, 2016

Respectfully submitted,

LATHAM & WATKINS LLP

By /s/ Jennifer L. Barry
Jennifer L. Barry
Attorney for craigslist, Inc.